

Kesserwani (Migration) [2024] AATA 1470 (21 May 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Fatima Kesserwani
REPRESENTATIVE:	Mr Jamal Daoud (MARN: 1807265)
CASE NUMBER:	2406522
DIBP REFERENCE(S):	BCC2022/4527363
MEMBER:	SM Michael Cooke
DATE:	21 May 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211 of Schedule 2 to the Regulations • cl 309.221 of Schedule 2 to the Regulations

Statement made on 21 May 2024 at 2:31pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – validly married – money transfers – neighbouring families – plans to start a family – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 20 March 2024 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 28 October 2022 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant (the applicant) did not satisfy cl 309.211 because the delegate found she did not meet the definition of spouse in s 5F of the Act.
4. The applicant's representative has assisted the Tribunal by submitting a trove of additional information pursuant to reg 1.15A(3).
5. The applicant appeared before the Tribunal on 21 May 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. An (Lebanese) Arabic language interpreter assisted the Tribunal.
6. The applicant was represented in relation to the review and the representative attended the hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant meets s.5F of the Act.

SPOUSE/DE FACTO (cl 309.211(2), cl 309.221)

Whether the parties are in a spouse or de facto relationship

9. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision: cl 309.221. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
10. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

12. Findings and reasons about each matter in reg 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under reg 1.15A(2):

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
13. The parties are separated geographically but the sponsor has evidenced sending around AUD150 a month as remittances to assist the applicant with any personal expenses. She explained (in oral evidence) that with the dire economic situation in the Lebanon this money went a long way as she remained living with her family.
 14. The Tribunal is satisfied that the financial aspects of the relationship - as they maintain in this particular geographic situation - are spousal in nature.
 - Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
 15. The parties are separated geographically preventing permanent living arrangements and sharing of housework. However, when visiting the Lebanon for short periods the sponsoring spouse lives with the applicant. Alternatively, she lives at his family home in South Lebanon. They have no biological children together but indicated (in oral evidence) that this was their long-term wish.
 16. The Tribunal is satisfied that the parties maintain a spousal household when together in Lebanon.
 - Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
 17. The applicant and sponsor lived next door to each other in Lebanon many years ago – they informed in oral evidence. When together in Lebanon the applicant indicated they hire a car and travel all round Lebanon enjoying themselves. Her aunt and his uncle are married partners and have reunion dinners when the sponsor is in Lebanon. They also socialize with family members when at home in Lebanon. The sponsor informed that his friends are forever asking him when she will arrive in Australia.

18. The Tribunal is satisfied that where possible the parties share social aspects of the relationship which are self-evidently spousal in nature.
- Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
19. The parties have known each other for a lengthy period as neighbouring families years ago in Lebanon. They have been together as married partners for two years - despite the obvious geographical separation. Both have been previously married and have been long separated. They both wished to remarry and have a family together in Australia. The applicant has had some health issues and has had the stress of living in a war torn country in economic crisis.
20. Despite this, the sponsor has kept in constant contact with her - she informs. He wished to visit her recently (she informed in oral evidence) but her concern for his safety was such that she begged him to stay in Australia. She thus forwent the chance of reunion in Lebanon. They see their relationship as long-term.
21. The Tribunal is satisfied that the nature of the person's commitment to each other is spousal in nature.
- Any other circumstances of the relationship.
22. The applicant requested priority processing of their review, and this request was granted by the Tribunal.
23. The Tribunal has considered "the full circumstances of the relationship" and makes the following findings on these matters against s 5F(2)(b)-(d) of the Act. The parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and they live together or not separately and apart on a permanent basis.
24. On the basis of the above the Tribunal **is** satisfied that the requirements of s 5F(2) are met at **the time the visa application was made** and at **the time of this decision**.
25. Therefore, the visa applicant **meets cl 309.211 and cl 309.221**.
26. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.
27. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

28. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl 309.211 of Schedule 2 to the Regulations
 - cl 309.221 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).